MOTION FILED
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Nos. 91-617, 91-618, 91-619

In The
Supreme Court of the United States
October Term, 1991

Tony AVIRGAN, Martha HONEY, Daniel P. SHEEHAN, and THE CHRISTIC INSTITUTE,
Petitioners,

versus

John HULL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE and BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONS

Arthur H. Bryant
(Counsel of Record)
Trial Lawyers for Public Justice
1625 Mass. Ave., N.W. #100
Washington, D.C. 20036
(202) 797-8600

Attorneys for *Amicus Curiae*
Trial Lawyers for Public Justice

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONS

Trial Lawyers for Public Justice, P.C., moves this Court for leave to file the attached brief *amicus curiae* supporting the petitions for certiorari on the issue of sanctions. Petitioners have consented to this motion. Respondent Singlaub, through his counsel of record, has opposed it.

INTEREST OF THE *AMICUS*

Trial Lawyers for Public Justice is a national public interest law firm dedicated to using the skills and approaches of plaintiffs' trial lawyers to advance the public good. Supported by and operating through a nationwide network of nearly 1000 of the country's outstanding trial lawyers, TLPJ pursues precedent-setting and socially significant litigation in both the federal and state courts. Through such litigation, it seeks to advance consumer and victims' rights, environmental protection and safety, civil rights and civil liberties, occupational health and employees' rights, and the protection of the poor and the powerless.

TLPJ has three reasons for being particularly interested in the sanctions issue in this case. First, to an extremely limited extent, TLPJ was directly involved in some of the proceedings below. Over four years ago, in October 1987, TLPJ and forty-five of its cooperating attorneys sought leave to enter appearances below for the limited purpose of taking depositions on plaintiffs' behalf.

The district court denied the motion, stating that attorneys could take depositions for the parties without entering their appearances in the case. Several TLPJ cooperating attorneys then proceeded to take depositions. Neither their conduct nor TLPJ's is in any way related to the entry of sanctions, but, as a direct result of our limited involvement below, we are convinced that plaintiffs' pre-filing investigation was extraordinary and that the case was filed and pursued in good faith.

Second, TLPJ is gravely concerned about the effect that the massive sanctions imposed in this case will have on the ability of all potential plaintiffs to pursue justice in the federal courts. The trial lawyers who perform and support TLPJ's work participate daily in virtually every type of litigation conducted in the federal courts: personal injury, commercial, civil rights, products liability, consumer, RICO, antitrust and securities class actions, etc. If the sanctions entered here are appropriate, then the entire plaintiffs' trial bar is at risk, as is the ability of all victims of tortious and criminal conduct to obtain adequate representation.

Third, as a public interest law firm, TLPJ is especially aware of and disturbed by the deleterious impact that the huge sanctions award issued in this case will have on the practice of public interest law. The courts below imposed over $1 million in sanctions jointly and severally against the individual attorney, the public interest law firm by which he is employed, and the individual clients without differentiating between the legal standards applicable to and the conduct of each. An award of this magnitude with no clear enunciation of the legal duties of the lawyer, the firm, and the clients seriously chills the practice of public interest law and the willingness of potential public interest clients to participate in litigation.

REASONS FOR GRANTING THE MOTION

TLPJ seeks leave to file the attached brief *amicus curiae* because of its concerns about the grave threat that the sanctions entered below poses to the general practice of law and the future of public interest litigation in the federal courts. The brief stresses two reasons for granting certiorari.

First, given the extraordinary pre-filing investigation in this case and the reasons provided by the courts below for imposing sanctions, the entry of sanctions here constitutes a danger to all who litigate in the federal courts. Plaintiffs' pre-filing investigation and demonstration of facts in this case went far beyond what most plaintiffs or their lawyers do or are capable of doing. If they can be sanctioned here on the ground that the case should never have been filed, no lawyer, no law firm, and no client is safe.

Second, the utter failure of the courts below to differentiate between the conduct of and legal standards applicable to the attorney, the public interest law firm for which he works, and the clients will seriously impact the future of public interest litigation. If sanctions of this magnitude are going to be considered, much less awarded, then the respective legal duties of the lawyers, the law firm, and the clients have to be absolutely clear. Otherwise, public interest litigation -- in which the clients are usually motivated by matters other than their interest in receiving monetary compensation -- is likely to be significantly deterred.

WHEREFORE, TLPJ respectfully urges this Court to grant its motion for leave to file the attached brief *amicus curiae*.

December 16, 1991 Respectfully submitted,

Arthur H. Bryant
(Counsel of Record)
Trial Lawyers for Public Justice
1625 Mass. Ave., NW #100
Washington, D.C. 20036
(202) 797-8600

Attorneys for *Amicus Curiae*
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BRIEF *AMICUS CURIAE* OF TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS*

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

STATEMENT OF THE CASE

We hereby adopt and incorporate by reference the Statement of the Case contained in the Petition for Writ of Certiorari of the Christic Institute.

REASONS FOR GRANTING THE WRIT

We write separately to stress two grounds for granting the writ:

1. Given the facts of this case, the entry of sanctions constitutes a danger to all who litigate in the federal courts. There are three reasons this is so:

a. While the courts below did not mention it at all, plaintiffs' pre-filing investigation and demonstration of the facts underlying their allegations were extraordinary. The plaintiffs in this case, professional journalists, spent over a year interviewing scores of sources throughout the world in order to find out who was responsible for the La Penca bombing and their injuries. They then published an investigative report blaming many of the individuals later named as defendants, including John Hull. When Hull responded by filing criminal libel charges against them in Costa Rica, they went to court and won; the judge

specifically found that their conclusions were supported by "a serious and meticulous analysis of all the interviews, ... documents, tapings, and filmings" and could in no way "be considered as irresponsible." R3.103-App.I at 7.

It was only after this extensive investigation and the Costa Rican court's specific finding that their allegations were well supported that Avirgan and Honey filed the instant lawsuit. For the courts below to enter sanctions on the ground that the case should never have been filed is, therefore, incredible. Very few plaintiffs or their lawyers have ever done (or could ever do) more to investigate and demonstrate the validity of their allegations prior to filing suit.

The primary case cited by the courts below to support the imposition of sanctions, *Collins v. Walden*, 834 F.2d 961 (11th Cir. 1987) (*Collins* II), moreover, only underscores the propriety of plaintiffs' and their counsel's actions in this case. In *Collins* II, the plaintiffs had previously filed a lawsuit based on precisely the same facts and theories. During the course of the first suit, the district court had noted indications in the record that the plaintiffs' motive appeared to be harassment and explicitly told them that, if that was so, sanctions might ultimately be imposed. *Id.* at 963. After extensive discovery, the case was dismissed because, among other things, plaintiffs failed to produce or discover any evidence to support their allegations. *Id.* at 964. The Eleventh Circuit affirmed the dismissal, *Collins v. Walden*, 784 F.2d 402 (11th Cir. 1986)(*Collins* I), but despite the district court's warning, no sanctions were imposed.

Then, plaintiffs and their counsel filed a second suit essentially making the same allegations. This time, the district court imposed sanctions, in addition to dismissing the case. The Eleventh Circuit, quite understandably, affirmed. *Collins* II, *supra.*

The contrast between this case and *Collins* could hardly be more stark. Here, plaintiffs conducted an extensive investigation and, despite the absence of discovery, adduced sufficient evidence in support of their charges to actually win a libel case. Then, they instituted this lawsuit, fully intending to take the discovery to which they were, for the first time, entitled. If sanctions can be entered against them, then virtually all federal court litigators (who necessarily do far less pre-filing investigation) are at risk.

b. While some of the district court's factual assertions (quoted and relied upon by the appellate court) are, unfortunately, clearly erroneous, the primary factual grounds offered for the entry of sanctions below were that plaintiffs relied on hearsay in filing their case, that plaintiffs resisted defendants' discovery efforts, that some witnesses testified differently under oath than plaintiffs' counsel expected them to, and that, after two years of discovery, plaintiffs were unable to withstand defendants' motion for summary judgment. These things happen in litigation throughout the federal courts every day. They do not support a finding that plaintiffs or their counsel did anything wrong, much less that sanctions are appropriate.

In this respect, what the courts below did not do is at least as important as what they did do. At no time did they find that plaintiffs' claims were "entirely without color and ha[d] been asserted wantonly, for purposes of harassment or delay, or for other improper reasons." *Browning Debenture Holders' Committee v. Dasa Corporation*, 560 F. 2d 1078, 1088 (2d Cir. 1977) (defining standard for bad faith). Nor did they comply with the procedural safeguards that controlling precedent imposed in regard to a finding of bad faith or improper purpose. See *Donaldson v. Clark*, 819 F. 2d 1551 (11th Cir. 1987) (procedural requirements for Rule

11 sanctions); *Rothenberg v. Security Management Co. Inc.*, 736 F. 2d 1470 (llth Cir. 1984) (findings required for sanctions for bad faith). Instead, based on aspects of the case that were in no way unusual, the courts simply held that sanctions were appropriate. Such unrestrained judicial activism poses a severe threat to all who litigate in the federal courts.

c. While the courts below did not discuss the law applicable to sanctions in any detail, the primary legal ground they gave for the entry of sanctions is that plaintiffs and their counsel "must have known prior to suing that they had no competent evidence to [prove their case]." Even if plaintiffs and their counsel had known this prior to suing (we believe otherwise), that would not be a proper basis for the imposition of sanctions. Responsible attorneys routinely file cases without having competent evidence to prove their allegations; they reasonably believe that such evidence will be obtained through discovery. Neither they nor their clients should be subject to sanctions for following this entirely appropriate course of conduct.

To offer but one of what could be thousands of examples, in *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, 475 U.S. 574 (1986), two American television manufacturers sued 21 Japanese television manufacturers, charging that the defendants had conspired to drive American firms from the American television market. After several years of discovery far more voluminous than that taken below, summary judgment was entered in defendants' favor. The lower courts held, and this Court agreed, that plaintiffs had neither discovered nor produced any admissible evidence that raised a genuine issue of material fact as to the existence of the alleged conspiracy. Under the approach of the courts below in this case,

therefore, sanctions should have been entered against plaintiffs' counsel because they "must have known prior to suing that they had no competent evidence to prove their case." In fact, however, no sanctions were entered. Indeed, no sanctions were even discussed. That is how it should be. That is also why the sanctions entered here pose such a danger.

2. The sanctions rulings here pose an especially grave threat to those who practice or seek to participate in public interest litigation. This is so because the decisions below fail to draw any distinctions between the conduct of and legal duties applicable to the individual attorney, the public interest law firm that employs him, and the clients. The courts below consistently treat these different sanctioned parties as if they are interchangeable and as if improper conduct by one is automatically attributable to all -- at a price of over one million dollars.

As this Court knows, public interest litigation is generally conducted by dedicated and principled attorneys working for comparatively meager wages. The organizations that employ these lawyers are themselves usually underfunded and dependent upon financial contributions for their support. Public interest clients, moreover, are usually motivated more by concern for principle and the public good than they are by an interest in obtaining financial compensation. For all of these reasons, any threat of significant monetary sanctions is likely to be particularly chilling on those who participate in public interest litigation.

Given these considerations, it is especially important that, if monetary sanctions are to be considered, much less awarded, the legal standards applicable to the conduct of public interest lawyers, law firms, and clients, respectively, be absolutely clear. This case both demonstrates the need to

-- and gives the Court the opportunity -- to clarify those legal standards. If those standards remain unclear, particularly considering the enormity of the sanctions award in this case, the practice of public interest law will inevitably be chilled.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

December 16, 1991

Arthur H. Bryant
(Counsel of Record)
Trail Lawyers for Public Justice
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(202) 797-8600

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